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ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

October Term, 1984

THE KANSAS CITY SOUTHERN RAILWAY
COMPANY,
Petitioner,

vs.

BENNY K. CHAFFIN,
Respondent.

BRIEF IN RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS, AT TEXARKANA, TEXAS

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QUESTIONS PRESENTED

The State Court, following the guidelines of this Court's pronouncements in *Liepelt* (*Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 775, 62 L.Ed. 2d 689 (1980)), admitted evidence of inflation on the question of Respondent's future earnings loss in this Federal Employers Liability Act jury trial. The Texas Courts neither approved nor disapproved any specific approach to adjusting damage awards to account for inflation in F.E.L.A. jury trials, and such interpretation of the opinion below is not possible. There was no contention in the Texas Trial Court or the Texas Court of Appeals that Respondent's award should be adjusted to account for inflation "according to the below market discount rate". Accordingly, the only Questions Presented for Review are:

1. Did Petitioner preserve for review the issues which it urges here for the grant of certiorari?
2. Have the Texas Courts "challenged" the prevailing Federal law with respect to adjusting damage awards to account for future inflation in State Court F.E.L.A. jury trials?

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**BRIEF IN RESPONSE TO PETITIONER'S PETITION
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DISTRICT OF THE STATE OF TEXAS,
AT TEXARKANA, TEXAS**

STATEMENT OF THE CASE

This case was tried to a jury in mid-November, 1981 on the issue of damages only. The highly intricate arguments advanced for the first time in Petitioner's Application for Writ of Error to the Texas Supreme Court, and in its Petition for Certiorari in this Court, attack this simple, one sentence holding by the Texas Court of Appeals:

"* * * in view of this recent case (*Culver v. Slater Boat Co., infra*), it is evident that the admission of inflation was not error." (Op. of Court of Appeals of Texas, p. 2a, Appendix A).

Briefly summarized, the Petitioner's complaints here are that the Texas courts have done violence to the uni-

form administration of the Federal Employers Liability Act by approving an approach to adjusting damage awards to account for future inflation which is not consistent with controlling Federal law. This complaint focuses upon Petitioner's contention that Respondent's economic expert used the wrong discount rate to reduce lost future wages to present value.

These complaints can be defeated substantively, but part of the problem in dealing with them is the procedural context in which they are urged.

Respondent used an expert economist, Dr. Funderburk, to estimate the discounted value of future wages to be lost by Respondent through Petitioner's admitted negligence. (II S.F. 278, et seq.). Dr. Funderburk explained the procedures by which he computed those damages in explicit and understandable detail. (II S.F. 278-311). The railroad did not choose to challenge Dr. Fundreburk's methods and formulas by offering in opposition an expert of its own. It was content to rely upon its cross-examination of Respondent's expert.

Petitioner alibis now for not countering Respondent's expert testimony at the trial on the premise that to have done so would have waived its objection to the overall admissibility of the evidence of inflation. (Pet. for Certiorari, p. 22, n.10). Such is simply not the Texas law.¹

At the trial, the *only* issue made over the computation of damages was whether it was permissible, in F.E.L.A. cases, for the jury to consider the effect inflation would

1. *Roosth & Genecov Production Co. v. White*, (Tex. S.Ct. 1953) 262 S.W.2d 99 at 104, holding that defensive maneuvers such as cross-examination and offering rebuttal testimony do not waive objection to inadmissible evidence. Accord *E.L. Cheeney Company v. Gates*, 346 F.2d 197 (5th Cir. 1965). This principle is noted in footnote 45, p. 37 of the text cited by Petitioner. (1 R.Ray, Texas Law of Evidence, Sec. 27 at p. 37 (3rd Ed. 1980)).

have upon future earnings lost. (Petitioner's Motion in Limine, §5, Tr. p. 70). Dr. Funderburk did figure inflationary factors into his calculations of lost future earnings. (II S.F. 282-287). In response to that, the *only* objection the Petitioner made to any aspect of Dr. Funderburk's testimony, his procedures, or his conclusions was as follows:

"Q. Dr. Funderburk, I think all of us know and understand what it means but for the record what are we talking about specifically when we all talk about 'inflation'? What is 'Inflation'?"

A. Inflation really is just—

MR. GOODING: Excuse me.

At this time we are going to renew our objection to the discussion of inflation because it is a field that is purely speculation, open to conjecture and we are going to renew our Motion in Limine at this time.

I object to it.

And furthermore we object because of any indirect relationship through salary and wage increases.

THE COURT: Overruled.

MR. NIX: I'm sorry.

MR. GOODING: May we have a continuing objection to that so I won't have to continue interrupting him?" (II S.F. 284, lines 1-20).

In the Court of Appeals, the *only* Point of Error the railroad brought forward relating to the question of damages and inflation was this one:

"POINT OF ERROR NO. ONE

Judgment must be reversed because the trial court erred in admitting evidence as to the effects of inflation on Chaffin's claim for loss of earning capacity in the future." (Brief of Appellant in Court of Appeals, p. 2).

Petitioner requested no instructions from the trial court to the jury on guidelines it should use concerning the evidence of future inflation, and made no objection to the court's charge for failure to more fully instruct the jury on the methodology it should apply in handling this evidence. Neither did it object to the discount rate used by Dr. Funderburk in his calculations. It made no objection to the effect that the trial court was following the wrong methodology or that it should use a different approach. All of these steps were procedurally prerequisite to preserve the Points now urged on appeal.

THE SUMMARY OF THE ARGUMENT

This was a State court jury tried F.E.L.A. case. At the time the case was tried, Petitioner sought to blindfold the jury regarding the phenomenon of national inflation. Petitioner placed utter and complete reliance on the discredited and doomed *Penrod*² rule, which at the time of the trial, the Fifth Circuit was re-examining *en banc*. The trial court elected to follow this Court's dicta in *Liepelt, supra*, as well as what was emerging at the time as the majority rule amongst the circuits, and admitted expert testimony concerning the impact of inflation on Respondent's future earnings loss. Petitioner elected not to rebut

2. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (*en banc*), cert. denied, 423 U.S. 839, 96 S.Ct. 68 (1975).

this testimony, or object to the methods used by Respondent's expert in reaching his conclusions. It waived any complaint on the subject other than that the evidence was not admissible *for any purpose*. As almost any fool could have seen, the carcass of *Penrod* was headed for, and now rests in a well deserved and unlamented grave. Evidence of inflation is, and always has been, admissible in these circumstances. There is no issue before the Court for review, and this Petition is a rank trespass upon the Court's time.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Complaints Embodied in the Petition for Certiorari Were Not Properly Preserved in the Courts Below.

From a procedural standpoint, it is quite clear that the only issue preserved for review and the *only* issue before the Court of Appeals, was the broad question of whether "inflation" can be taken into account as a generic factor in computing an injured worker's lifetime future earnings loss in an F.E.L.A. case. That narrow issue was the *only* one decided by the lower court. To say that the lower court approved the "case by case" approach to adjusting damage awards in F.E.L.A. cases is simply not correct.

It is apparent from a quick reading of the Petition for Certiorari that the Petitioner no longer seriously contests the admissibility of "inflation" and its impact on future wage loss. In the Texas Supreme Court, and in this Court, the Petitioner quietly abandons its previous argument and diverts its attack upon the "methodology"

by which the inflationary factors were used to compute future earnings loss; more particularly, upon the criteria for selecting the proper rate by which to discount that loss to present value.

We must respectfully suggest, therefore, that the specific complaints advanced in the Petition for Certiorari are not properly preserved for review for these reasons:

1. The complaints were waived by failing to object in the trial court to the procedures and criteria by which Dr. Funderburk arrived at his estimate of future earnings loss. *Port Terminal Railroad Association v. Inge*, 524 S.W.2d 801, 803 (Tex. Civ. App., 1975, no writ); *Montgomery Ward & Co. v. Marvin Riggs Co.*, 584 S.W.2d 863, 868 (Tex. Civ. App., 1979, writ ref., n.r.e.); *Cobb v. Thomas*, 565 S.W.2d 281, 288-289 (Tex. Civ. App., 1978, writ ref., n.r.e.). If the "methodology" now attacked was truly a fatal legal flaw in Dr. Funderburk's expert conclusion, Respondent and the trial court were entitled to a specific objection defining the supposed defect so that the matter could be corrected at trial. The denial of this opportunity, the attempt to ambush the judgment with objections raised for the first time in this Court and the Texas Supreme Court, is a classic ground for waiver of an objection to testimony. *Texas Municipal Power Agency v. Berger*, 600 S.W.2d 850, 854-855 (Tex. Civ. App., 1980, no writ); *Wilkins v. Royal Indemnity Co.*, 592 S.W.2d 64, 68 (Tex. Civ. App., 1979, no writ).

2. Furthermore, the complaints here made were waived by absence of a point of error in the Court of Appeals specifically pointing out the "methodology" defects with the same detail as they are alleged and argued in this Court. The broad complaint embodied in "Point of Error No. One" below raised a single, broad issue - the admissibility of inflation factors, *vel non*. The minute,

specific, technical, and different complaints advanced in the Petition for Certiorari cannot be said to have been included in the single complaint in the Texas Court of Appeals, either directly or by inference. Such minimal specificity is essential to proper preservation for appellate review. Rule 418 (d), Tex. R. Civ. Proc.; *State v. Bilbo*, 392 S.W.2d 121, 126 (Tex. 1965); *Edwards v. Strong*, 147 Tex. 155, 213 S.W.2d 979, 980 (1948); *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 210 S.W.2d 558 (1948).

The Texas law that requires a party complaining of evidentiary errors to have preserved the point both in the trial and intermediate appellate courts mirrors the Federal rule which was succinctly stated in *Colonial Refrigerated Transportation, Inc. v. Mitchell*, (5th Cir.) 403 F.2d 552, thus:

“‘It is fundamental that where an objection is specific it is deemed to be limited to the ground or grounds specified and it does not cover others not specified’. *Knight v. Loveman, Joseph & Loeb, Inc.*, 5 Cir. 1954, 217 F.2d 717, 719. *The burden was on the defendants’ counsel to make a timely request that the court properly limit the admissibility of the evidence and properly charge the jury with respect to the manner in which it was to be considered.* *Camps v. New York City Transit Authority*, 2 Cir. 1958, 261 F.2d 320. Failure to do so constituted a waiver of the objection. *Complete Auto Transit, Inc. v. Wayne Broyles Engineering Corp.*, 5 Cir., 1965, 351 F.2d 478.” (Emphasis supplied).

To apply a different standard would permit a party to:

“‘Sit idly by and allow the trial court to commit error, wait for a verdict, and complain of the error only if the verdict is unfavorable.’ (*Skogen v. Dow*

Chemical Company, 375 F.2d 692, 703, citing *Crusan v. Ackman* 342 F.2d 611, 7th Cir. 1965)."

It is clear that certiorari should not be granted here, simply because the Court would have nothing to review.

II. The Narrow Ruling of the Courts Below Is in Accord With Every Federal Ruling on the Issue, and Challenges Nothing.

The Texas Trial Court and the Court of Appeals were asked by Petitioner to rule on one, and only one question: Is, or is not, evidence of inflation admissible for *any purpose* in a State Court F.E.L.A. jury trial? The Court of Appeals ruled only that the admission of this testimony was not error. This simple ruling is totally congruent with the authoritative pronouncements of this Court, and virtually every other Federal court in the land. To say it challenges the uniformity of administration of the F.E.L.A. is to pipe dream.

When this case was tried, this Court had given a clear signal to the Judiciary of this land charged with the administration of the Federal Employers Liability Act that the impact of inflation was a proper factor generally to be considered by the finders of fact in assessing damages. We illustrate:

"* * * (F)uture employment itself, future health, future personal expenditures, future interest rates, and *future inflation* are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that

are increasingly familiar with the complexities of modern life. * * *” (*Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. at 495, 62 L.Ed.2d at 694, emphasis added).

Given the trial court’s respect for the pronouncements of this Court when they seemingly conflict with the much criticized and inflexible *Penrod* rule, a rule that had already received national rebuke, and had been rejected by most circuits which considered it,³ it seems that there is little wonder that the trial court opted to rule consistently with the supreme law of the land. Indeed, the trial court’s actions were nothing more than its concerted efforts to bring the Texas Courts in line with this Court’s pronouncements.⁴

To suggest that the actions of the courts below represent a situation where the Texas Courts are attempting to “challenge” this Court’s interpretation of Federal law is totally uncalled for, and does a disservice to those courts’ efforts to enforce the Federal Employers Liability Act fairly and even handedly. The atmosphere in which the trial court acted was one in which he was confronted with a situation where this Court in the well reasoned *Liepelt dicta*, had, in effect, spelled the death knell for the ill-reasoned, inflexible and unfair *Penrod* rule, and

3. *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980); *Steckler v. U.S.*, 549 F.2d 1375 (10th Cir. 1977); *U.S. v. English*, 521 F.2d 63, 72 (9th Cir. 1975); *Bach v. Penn. Central Transportation Co.*, 502 F.2d 1117, 1122 (6th Cir. 1974); *Rains v. Diamond M. Drilling Co.*, 396 So.2d 306 (La. App. 1981); and *Culver v. Slater Boat Co.*, 644 F.2d 460 (5th Cir. 1981), 688 F.2d 289 (*en banc* 5th Cir. 1982) (*Culver I*).

4. Note that if the State Trial Court had ignored the *Liepelt dicta*, and adhered to *Penrod*, it would have been reversible error under the *Culver* opinions. This is precisely the result which occurred where a Federal District Court excluded Dr. Funderburk’s testimony on the basis of *Penrod* in another F.E.L.A. case. See *Martin v. Missouri Pacific Railroad Co.*, 732 F.2d 435 (5th Cir. 1984).

he was forced to make a choice. It is abundantly clear that when State courts perceive that a circuit court in its geographic area is out of line with the holdings of this Court, its obligation is to follow this Court's pronouncements. *Owsley v. Peyton*, 352 F.2d 804 (4th Cir. 1965). It is indeed to the trial judge's credit that he accurately perceived the direction in which the law on this subject was headed, and adhered to the precedent of his sister State to the east (*Rains v. Diamond M. Drilling Co.*, 396 So.2d 306 (La. App. 1981)), in following the *Liepelt dicta*, which ultimately became the law of this Court as well as of the Fifth Circuit. *Jones & Laughlin Steel Corporation v. Pfeifer*, U.S., 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983); *Culver v. Slater Boat Co.*, 644 F.2d 460 (5th Cir. 1981), 688 F.2d 289 (*en banc* 5th Cir. 1982) (*Culver I*); *Culver v. Slater Boat Co.*, 722 F.2d 114 (*en banc* 5th Cir. 1983) (*Culver II*), cert. denied, sub nom. *Schmidt v. Byrd*, No. 83-1749, 52 Law Week 3907 (June 18, 1984).

In light of the events subsequent to the trial judge's ruling and the ruling of the Court of Appeals, to suggest that those courts' rulings constitute a "challenge by the Texas courts to the abiding purpose of the Federal Employers Liability Act to 'create uniformity throughout the nation'." (Petitioner's Application, p. 14) is nothing short of ludicrous.

Indeed, if any challenging is going on in this area, we would respectfully suggest that it is happening within the Fifth Circuit, as was silhouetted by Judge Brown's brilliant dissent in *Culver II*:

"With the ink scarcely dry on *Pfeifer* (*Jones & Laughlin Steel Corp. v. Pfeifer*, U.S., 103 S. Ct. 2541, 76 L. Ed. 2d 768, 788 (1983)), in which, with re-

markable unanimous clarity, the High Court chose not to pick one of the several methods in its collective economic hat it considered legally sound for calculating lost future wages in civil damage actions and instead chose to leave that crucial decision to the trial judge in that and future cases, a majority of this Court elevates one approach beyond any choice to be the only way, for mandatory application in eighteen federal judicial districts across a half-dozen Southern states, for a broad group of litigants to arrive at fair sums of money to compensate injured parties. Guided by the decision in *Pfeifer*, its approval of *Culver I*, and the direction that the choice of methodology should be left to the district court, not this Court. I respectfully dissent." (722 F.2d 123).

Though not called upon to do so we disagree vehemently with the Petitioner's allegations that Dr. Funderburk used the wrong discount rate. He arrived at his discount rate in the same fashion as his inflation rate, by averaging the statistical and market rates over a period from 1967 through 1980. Interest rates and inflation rates were both higher at the time of trial, but Dr. Funderburk testified that the fairest means of projecting each over the long haul would be obtained by averaging. We submit that this approach is both economically sound and fundamentally fair, because it strikes a balance between the extreme high and low interest rates at which the injured plaintiff may be forced to invest his award when it is received and in accordance with his choice of investment strategy.

The most appropriate, accurate, and fair method of determining a proper "market interest rate" for discounting purposes is a subject which the adversary system

can easily handle. The railroad chose not to put on countervailing expert testimony. As was pointed out in Note 1 above, it could very easily have done this without jeopardizing its position that *Penrod* was still the law.

It had the opportunity, and fully exercised it, to explore its views as to the method of computing the discount rate by cross-examination of Dr. Funderburk. Dr. Funderburk responded by pointing out the fallacies in the railroad's approach. The subject was thus a proper one for the trier of fact. Deciding between competing theories is the proper role of the jury. The fact that it chose one expert view over another is hardly ground for reversal. Yet, that is most certainly what - and all - the railroad argues on this point.

Finally, we would briefly address the merits of Petitioner's contention that this writ should be granted so that this Court could reverse the lower courts and remand for retrial under directions that the hard and fast methodology of *Culver II* be used. Even the *Culver II* majority perceived the innate unfairness of saddling its methodology on courts and litigants who tried their cases before its publication. Accordingly, it specifically held that the new method for handling inflation there adopted would *not apply* to cases tried before publication of the opinion. Yet this is precisely what Petitioner would have this Court do. Shouldn't the Texas Court of Appeals, who relied on *Culver I* in making its ruling on the narrow issue of admissibility of the evidence, be accorded the same respect as the *Culver II* majority extended to the lower Federal courts? Why of course!

CONCLUSION

This Court, by this Petition, is urged to take a one issue F.E.L.A. jury trial from the Texas State Court system, and grant the Petitioner a new trial so that it can offer evidence it consciously elected to forego at the trial almost three years ago. There is no conflict with the rulings below by any pronouncement from this Court, or from the Court of Appeals for the Fifth Circuit. Practitioners cannot keep their heads above the sand and not know the horrendous workload of this tribunal. The filing of this Petition grossly aggravates that problem. We respectfully pray that the writ be denied.

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CERTIFICATE OF SERVICE

I hereby certify that forty (40) printed copies of the foregoing Brief in Response to Petitioner's Petition for Writ of Certiorari were placed in the United States Mail, addressed to the Clerk of the Supreme Court of the United States, and three copies of the Brief were furnished to each of the following:

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